PUBLIC DISCOURSE, EXPERT KNOWLEDGE, AND THE PRESS

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Abstract: This Essay identifies and elaborates two complications raised by Robert Post's *Democracy, Expertise, and Academic Freedom*, and in doing so attempts to show how Post's theory can account for constitutional protection of the press. The first complication is a potential circularity arising from the relationships between the concepts of democratic legitimation, public discourse, and protected social practices. Democratic legitimation predicates First Amendment coverage on participation in public discourse, whose boundaries are defined as those social practices necessary for the formation of public opinion. But close examination of the relationships between these three concepts raises the question of whether public discourse and social practices can do any analytic work independent of the value of democratic legitimation, or instead are simply labels for speech that furthers it. Consideration of the press helps to illuminate the problem and a potential solution.

The second complication is the interface between expert knowledge and public discourse. Post's theory of democratic competence convincingly explains how such knowledge is created and circulated outside of public discourse. But in order to inform self-governance, expert knowledge must ultimately be disseminated *into* public discourse. The theory does not yet account for how this happens, nor how such expert knowledge can serve an informative function, given that public discourse transmutes claims of expert knowledge into statements of opinion. Again, the press serves as an illustrative and important example.

INTRODUCTION

Robert Post's *Democracy, Expertise, and Academic Freedom*[1] explains our constitutional commitment to free speech in light of two central and sometimes conflicting principles: democratic legitimation and democratic competence. In doing so, the book employs concepts that Post has carefully crafted over the past few decades, including the constitutional concept of public discourse,[2] the lexical priority of

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1. ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE (2012).

2. *See generally* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601 (1990) [hereinafter Post, *Public Discourse*].

participatory democracy as a First Amendment principle,[3] and the need to orient First Amendment doctrine around social practices rather than "speech as such."[4] Drawing heavily on that earlier work, this Essay attempts to identify and explore two ways in which those concepts are particularly hard to reconcile. First, it is difficult to maintain a conceptual thread through public discourse, protected social practices, and democratic legitimation while treating each of them as independent and important parts of First Amendment analysis. Second, Post's theory raises intractable questions about how expert knowledge is disseminated into public discourse and how it should be treated once it arrives there. In the course of exploring those difficulties, this Essay also considers how Post's theory can account for First Amendment protection of the press.

Following the structure of the book, this Essay proceeds in two parts. Part I explores the relationships between public discourse, protected social practices, and democratic legitimation. Specifically, it asks whether the first two concepts define the boundaries of the third, or the other way around—whether, in other words, public discourse and protected social practices establish the boundaries of speech that furthers the principle of democratic legitimation, or whether they are simply labels for speech that does so. Part I begins, as Post does, with the proposition that the First Amendment must be interpreted in line with its core values.[5] The primary value of First Amendment doctrine is democratic legitimation[6]—allowing speakers to communicate in public discourse[7] and thereby experience themselves as participating in the

3. *See generally* Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477 (2011) [hereinafter Post, *Participatory Democracy*]; Robert Post, *Participatory Democracy as a Theory of Free Speech: A Reply*, 97 VA. L. REV. 617 (2011) [hereinafter Post, *Reply*].

4. *See generally* Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1250 (1995) [hereinafter Post, *Recuperating*]. Throughout this Essay, I will use "social practices" as shorthand for this focus on context rather than substance. Post also uses terms like "forms of conduct," "social roles," and "communicative processes." *See infra* notes 58–62 and accompanying text.

5. POST, *supra* note 1, at 4 ("The actual contours of First Amendment doctrine cannot be explained merely by facts in the world; they must instead reflect the law's efforts to achieve constitutional values."); Post, *Participatory Democracy*, *supra* note 3, at 477 ("I begin with the premise that interpreting the First Amendment involves explicating our national dedication to freedom of expression.").

6. Post, *Participatory Democracy*, *supra* note 3, at 482 ("In my view, the best possible explanation of the shape of First Amendment doctrine is the value of democratic self-governance.").

7. *Id.* ("The value of democratic legitimation occurs . . . specifically through processes of communication in the public sphere.").

shared project of self-government.[8]

Defining the boundaries of public discourse is therefore an essential, difficult, and inherently normative goal.[9] In pursuit of that goal, Post argues that public discourse is not defined by the content of specific speech acts, but by "the forms of communication constitutionally deemed necessary for formation of public opinion."[10] As in his previous work, Post focuses on these forms of communication, looking to "particular social practices"[11] rather than "speech as such."[12] He is thereby able to construct a rich First Amendment theory that is grounded in current doctrine, accounts for the social nature of speech, and leaves necessary room for argumentation and change.[13]

But as Part I of this Essay attempts to show, Post's approach also raises conceptual difficulties. If particular social practices are constitutionally protected because they constitute public discourse, and public discourse is defined by those practices and protected because it furthers them, then the two concepts appear circular and disconnected from the value of democratic legitimation, which is what justifies their protection in the first place.[14] On the other hand, if the value of democratic legitimation is doing all the work, then public discourse and protected social practices are simply labels for protected speech, not

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8. *Id.* at 483 ("The function of public discourse is to enable persons to experience the value of self-government.").

9. *Id.* at 488 ("Because the boundaries of public discourse are inherently normative, value judgments must be made about the forms of speech that are and are not necessary for the maintenance of democracy."); Post, *Public Discourse*, *supra* note 2, at 671 ("To classify speech as public discourse is, in effect, to deem it relevant to this collective process of self-definition and decisionmaking. There is obviously no theoretically neutral way in which this can be done.").

10. POST, *supra* note 1, at 15 (citing, inter alia, Rosenberger v. Univ. of Va., 515 U.S. 819, 831 (1995)).

11. *See* Post, *Recuperating*, *supra* note 4, at 1250 ("The Court has imagined that the purpose of First Amendment jurisprudence is to protect speech as such. But in fact the constitutional values advanced to justify this protection inhere not in speech as such, but rather in particular social practices.").

12. *Id.*; *see also* Post, *Participatory Democracy*, *supra* note 3, at 477–78 ("[T]he First Amendment does not and should not protect 'speech as such,' as Justice Souter once put it." (citing Glickman v. Wileman Bros. & Elliot, Inc., 521 U.S. 457, 478 (1997) (Souter, J., dissenting))).

13. Post, *Reply*, *supra* note 3, at 618 ("[T]he task of explicating our own moral commitments inevitably leaves ample room for critical intelligence."). I take Tim Scanlon to be addressing a similar point when he writes that "[t]he dialectical interplay between the guiding interests of a right and strategies for protecting these interests is what allows rights to grow and change." *See* T.M. Scanlon, *Why Not Base Free Speech on Autonomy or Democracy?*, 97 VA. L. REV. 541, 542 (2011).

14. As explained in more detail below in Part I.A, even assuming that I have read Post correctly, this criticism would not necessarily mean that the concept of democratic legitimation is based on a circularity, nor that it is empty, only that problems seem to arise when the concepts of public discourse and social practices are used to define one another.

substantive parts of the analysis.

This Essay considers a third understanding: that social practices, which together constitute public discourse, are proxies for identifying speech whose content presumptively furthers the principle of democratic legitimation. This differs from Post's approach inasmuch as it treats public discourse and social practices as having evidentiary, rather than intrinsic, value. Under the proxy approach, determining whether a particular social practice forms part of the "structural skeleton that is necessary, although not sufficient, for public discourse to serve the constitutional value of democracy"[15] requires a continuous assessment of whether the speech occurring within it tends to be "normatively necessary for influencing public opinion."[16]

The press provides a particularly useful lens through which to examine these relationships between public discourse, social practices, and democratic legitimation. Post writes that "[m]edia speech is . . . unique because it carries within it [a] prima facie claim to constitute public discourse, a claim based entirely on the manner of its distribution rather than on its content."[17] But despite this unique claim, First Amendment doctrine has never extended protection to the press *qua* press. Why not? Moreover, many forms of "media speech" are in fact denied full First Amendment protection—copyrighted speech and commercial advertising, for example. Why? These questions and other important issues, like the changing membership and mechanisms of the press, raise serious complications with treating the press as a part of public discourse.

While Part I of this Essay focuses on public discourse and the value of democratic legitimation, Part II focuses on the second major First Amendment value Post identifies: democratic competence. As he points out, effective democracy depends on more than just the ability to participate—it requires expert knowledge.[18] But "[t]he continuous discipline of peer judgment, which virtually defines expert knowledge, is quite incompatible with deep and fundamental First Amendment

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15. Post, *Recuperating*, *supra* note 4, at 1276.

16. POST, *supra* note 1, at 18.

17. Post, *Public Discourse*, *supra* note 2, at 678. As Post puts it in the book, "First Amendment coverage presumptively extends to media for the communication of ideas, like newspapers, magazines, the Internet, or cinema, which are the primary vehicles for the circulation of the texts that define and sustain the public sphere." POST, *supra* note 1, at 20. It follows that, "[i]n the absence of strong countervailing reasons, whatever is said within such media is covered by the First Amendment." *Id.*

18. *See, e.g.*, POST, *supra* note 1, at 32, 35.

doctrines," such as those governing viewpoint and content neutrality.[19] As Post puts it, "[d]emocratic competence is thus both incompatible with democratic legitimation and required by it."[20] The bulk of his book is devoted to reconciling the two, or at least sketching the terms of a détente.

Part II explores two particularly difficult questions of democratic competence: how expert knowledge enters into public discourse, and how public discourse can accommodate it once it arrives there. Post devotes considerable attention to the creation and circulation of expert knowledge *outside* of public discourse. But in order to inform public discourse—which Post considers an essential function of democratic competence[21]—such knowledge must at some point enter *into* it. How does that dissemination happen? Does it, like the creation of expert knowledge, require disciplinarity?[22] Moreover, as Post notes, "[w]ithin public discourse, traditional First Amendment doctrine systematically transmutes claims of expert knowledge into assertions of opinion."[23] How, then, does expert knowledge in public discourse add any value above and beyond other claims of opinion?

In assessing democratic competence, Post focuses predominately on the role of universities in creating and disseminating expert knowledge.[24] The press, too, engages in information-producing activities that are essential to its role but not a part of public discourse—newsgathering, for example—and sometimes creates expert knowledge through investigative journalism and the like. Perhaps, then, the press is also entitled to constitutional protection under the principle of democratic competence. This conclusion raises its own complications, some of which overlap with those Post raises with regard to universities. Does the press have its own disciplinary standards? Are they worthy of respect? How can one define the boundaries of the press, and how do those changing boundaries impact its disciplinarity?

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19. *Id.* at 9; *see also id.* at 31 ("The creation of reliable disciplinary knowledge must accordingly be relegated to institutions that are not controlled by the constitutional value of democratic legitimation.").

20. *Id.* at 34.

21. *See infra* notes 135–40 and accompanying text.

22. By disciplinarity, I mean the same thing as Post does—the observation of a discipline's own internal norms for veracity. *See* Robert Post, *Debating Disciplinarity*, 35 CRITICAL INQUIRY 749, 751 (2009) ("When we speak of a discipline, therefore, we speak not merely of a body of knowledge but also of a set of practices by which that knowledge is acquired, confirmed, implemented, preserved, and reproduced.").

23. POST, *supra* note 1, at 44.

24. *See id.* at 61–95.

It is beyond this Essay's scope, and its author's ability, to answer all of these questions. The more limited goal here is to explore possible tensions among some of the major themes animating Post's book and his other trailblazing First Amendment scholarship. These include the complicated relationships between public discourse, protected social practices, and democratic legitimation, and the difficulty of accommodating expert knowledge within public discourse. In evaluating these themes, this Essay also tries to apply Post's theory to what is perhaps the most constitutionally prominent speech practice of all: journalism.[25]

I. PUBLIC DISCOURSE AND THE PRESS

The relationship between public discourse and the social practices comprising it is central to the notion of democratic legitimation, which is the primary principle in Post's First Amendment theory.[26] And yet the normative account of their constitutional value appears somewhat circular: particular social practices are protected to the extent that they constitute public discourse, while public discourse is protected to the extent that it consists of those social practices. The animating value underlying each is democratic legitimation, but the process of identifying when they are at work seems to lead to circular (or perhaps "public spherical") results. This Part describes that complication, and asks whether close consideration of the press as a First Amendment institution can help resolve it.

A. Public Discourse, Social Practices, and Democratic Legitimation

Post's work begins with the premise that it is only possible to understand First Amendment doctrine in light of the values and principles the Amendment seeks to effectuate.[27] Identifying those values, of course, is perhaps the central quest in free speech scholarship.[28]

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25. *See infra* Parts I.B and II.B (analyzing constitutional coverage of press activities in light of the principles of democratic legitimation and democratic competence). For the purposes of this Essay, I treat the press and journalism as more or less interchangeable concepts. I realize that this is a contested proposition. *See generally* Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459 (2012) (arguing that the Press Clause was understood as giving protection not just to journalists, but more broadly to everyone using the technology of the press).

26. POST, *supra* note 1, at 37 ("[T]he value of democratic legitimation trumps that of democratic competence.").

27. *See* sources cited *supra* note 5.

28. The Virginia Law Review recently collected a series of essays by preeminent First

Individual autonomy and the marketplace of ideas are often treated as the leading candidates, but Post's book begins by showing that they are flawed at best.[29] He argues instead that the primary—although not perfect or sole[30]—value behind the First Amendment is "democratic legitimation," the notion that "First Amendment coverage should extend to all efforts deemed normatively necessary for influencing public opinion."[31]

The animating value of democratic legitimation, Post says, is "the hope that persons who are permitted the opportunity to make public opinion responsive to their own subjective, personal views might come to regard themselves as the potential authors of the laws that bind them."[32] Thus "those who are subject to law should also experience themselves as the authors of law," and should have "the possibility of influencing public opinion."[33] In order to achieve this, the First Amendment "requires . . . that public opinion remain continuously open to revision."[34]

This view of the First Amendment draws strength from theories based on individual autonomy (what Post calls the "ethical" view), the marketplace of ideas ("cognitive"), and democratic functioning

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Amendment scholars addressing Post's arguments and presenting others. *See* James Weinstein, *Introduction*, 97 VA. L. REV. iii (2011) (introducing symposium).

29. POST, *supra* note 1, at 6–13.

30. Post has argued for more than a decade in favor of a lexical priority of First Amendment theories. *See* Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2371 (2000) [hereinafter Post, *Theory and Doctrine*] ("[W]here the doctrinal implications of different prominent theories of the First Amendment collide, courts will tend to give priority to the participatory theory of democracy. But this does not mean that other theories do not continue to have weight and consequence when they are not inconsistent with the participatory theory."); *see also* Post, *Reply*, *supra* note 3, at 617 (noting that "a certain degree of pragmatic simplification" is an "inevitable consequence" of describing constitutional principles that can be easily explained and feasibly implemented); James Weinstein, *Participatory Democracy as the Basis of American Free Speech Doctrine: A Reply*, 97 VA. L. REV. 633, 679 (2011) ("[P]articipatory democracy is the worst theory of free speech, except for all the others.").

31. POST, *supra* note 1, at 18.

32. *Id.* at 27–28.

33. *Id.* at 17. As Post notes, giving citizens access to the public sphere and requiring governmental decision making to be rendered accountable to public opinion are "necessary for democratic legitimation; they are not sufficient." Post, *Participatory Democracy*, *supra* note 3, at 482 & n.17; *see also* POST, *supra* note 1, at 21; Steven Shiffrin, *Dissent, Democratic Participation, and First Amendment Methodology*, 97 VA. L. REV. 559, 560 (2011) ("[I]t is worth noting that political participation and the public sphere are not co-extensive."). Post has elsewhere called this the argument from participatory democracy. *See* Post, *Theory and Doctrine*, *supra* note 30, at 2367–68 (describing "participatory" theory of democracy as "locat[ing] self-governance . . . in the processes through which citizens come to identify a government as their own").

34. POST, *supra* note 1, at 20.

("political"),[35] but does not depend on any one of them. Crucially, it is deeply grounded in current doctrine.[36] It explains, for example, why First Amendment doctrine purportedly denies that there is such a thing as a "false idea" in public discourse,[37] protects public employees speaking on matters of public concern (and less so when they are not),[38] and erects high barriers to defamation claims when the plaintiff is a public figure.[39] Exploring these examples and others, Post presents democratic legitimation as "the most convincing account of the normative foundations of our First Amendment."[40]

Post has defended this account of the First Amendment's underlying values elsewhere and at some length.[41] The purpose of this Essay is not to revisit the question of whether democratic legitimation is the primary value of the First Amendment, but to explore the ways in which that value is or can be effectuated in doctrine. For even if one accepts democratic legitimation as the First Amendment's central value, there remains the difficult question of determining how courts can recognize it at work.[42] That is, in order to resolve actual cases, those who embrace the theory must be able to show whether particular speech acts implicate the value of democratic legitimation.

Post's primary solution is to say that the value of democratic legitimation is implicated when speech occurs within "public discourse." Though this is not a necessary condition for First Amendment protection[43]—the value of democratic competence, after all, extends to speech that is not. Post argues that the line between speech inside and

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35. *See id.* at 6.

36. Post rightly regards this as an important quality of his or any other First Amendment theory. *See id.* at 4–5 (suggesting that "we can learn the purposes we have constructed First Amendment doctrine to achieve by tracing the contours of actual First Amendment coverage"); *see also* Post, *Reply*, *supra* note 3, at 617–18.

37. *See* POST, *supra* note 1, at 29 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1979)).

38. *See* Garcetti v. Ceballos, 547 U.S. 410, 417 (2006) (concluding that First Amendment coverage is triggered "in certain circumstances" when a government employee "speak[s] as a citizen addressing matters of public concern").

39. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (requiring public officials to demonstrate "actual malice" in order to prevail in defamation cases).

40. POST, *supra* note 1, at xii.

41. *See, e.g.*, Post, *Participatory Democracy*, *supra* note 3; Post, *Reply*, *supra* note 3.

42. Elsewhere, Post has explained that regulations can fall within the scope of the First Amendment either because of "what content" they limit or "why" they do so. Post, *Participatory Democracy*, *supra* note 3, at 478 n.4 ("These logically distinct inquiries refer roughly to the object and purpose of a government regulation."). My focus here is on the former.

43. Post, *Public Discourse*, *supra* note 2, at 667 n.323 ("I do not mean to imply, of course, that the First Amendment protects only public discourse.").

outside of public discourse is "the single most salient pattern of entrenched First Amendment doctrine."[44] Within public discourse, First Amendment doctrine generally avoids judgments about the truth of speech and truth generally,[45] respects the speakers' autonomy interests,[46] and treats all speakers as having equal value.[47] Outside of public discourse, none of these things is true.

But focusing on the boundaries of public discourse, rather than abstractly on the boundaries of democratic legitimation, simply reframes the definitional question: What constitutes public discourse? This is an extremely difficult[48] and inherently normative[49] question, whose answer is continually changing.[50] Moreover, "[w]hether through its political or its judicial branches, governmental definition of the scope of public discourse is itself a *regulation* of public discourse . . . ."[51] Post nonetheless concludes that although we do not "have a very clear or hard-edged account" of the boundaries of public discourse, "it is anthropologically apparent that they do exist and are reflected in constitutional doctrine."[52]

This Essay holds aside the institutional objections, which do not seem unique to Post's theory, and focuses on a conceptual complication that might be: the degree to which the concepts of public discourse and social practices can do any work (in terms of driving the analysis) independent of the value of democratic legitimation. If the boundaries of First Amendment coverage depend on the *mutually defining* concepts of

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44. POST, *supra* note 1, at 23.

45. *See* Hustler Magazine v. Falwell, 485 U.S. 46, 51 (1988) ("The First Amendment recognizes no such thing as a 'false' idea." (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974))). As Post notes, however, the Court has also said that "there is no constitutional value in false statements of fact." *Gertz*, 418 U.S. at 340; *see also* POST, *supra* note 1, at 29–31, 43–47 (suggesting that the distinction can be explained based on whether the purportedly false statements are part of public discourse).

46. *See* POST, *supra* note 1, at 24.

47. *Id.* at xiii.

48. C. Edwin Baker, *Is Democracy a Sound Basis for a Free Speech Principle?*, 97 VA. L. REV. 515, 516 (2011) (noting "the serious difficulty of identifying when the person is engaged in protected public discourse").

49. POST, *supra* note 1, at 15; *see also* Post, *Public Discourse*, *supra* note 2, at 683 (noting "the startling proposition that the boundaries of public discourse cannot be fixed in a neutral fashion").

50. Post, *Public Discourse*, *supra* note 2, at 683 ("In the end . . . there can be no final account of the boundaries of the domain of public discourse.").

51. Martin H. Redish & Abby Marie Mollen, *Understanding Post's and Meiklejohn's Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NW. U. L. REV. 1303, 1343 (2009) (emphasis added); *see also* Post, *Public Discourse*, *supra* note 2, at 683–84 (anticipating this objection).

52. Post, *Reply*, *supra* note 3, at 622–23.

public discourse and protected social practices, then those boundaries are disconnected from the underlying constitutional value of democratic legitimation. This is the problem Post's theory seems to face. If instead the boundaries are based directly on whether particular speech acts further the value of democratic legitimation, the concepts of public discourse and protected social practices seem to be little more than conclusory labels.[53] This is the problem manifested in the U.S. Supreme Court's "public concern" jurisprudence.[54] The difficulty, then, is finding a way to effectuate the value of democratic legitimation without either ignoring or inflating the importance of public discourse and social practices, or separating them from the underlying importance of democratic legitimation itself. It may be helpful first to consider the possible flaws in the two alternatives just described.

Post suggests that "[t]he contours of First Amendment coverage . . . be determined in the first instance by a normative inquiry into the forms of conduct we deem necessary for the free formation of public opinion."[55] It follows that "[p]ublic discourse includes all communicative processes deemed necessary for the formation of public opinion."[56] This is an approach grounded very heavily in the context of speech, rather than its content.[57] It focuses on "communicative processes,"[58] "forms of conduct,"[59] "forms of social order,"[60] "social practices,"[61] and "social roles"[62] rather than the content of speech itself.

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53. Along similar lines, Eugene Volokh suggests that public discourse might simply be "a conclusory label for that speech which is most protected." Eugene Volokh, *The Trouble With "Public Discourse" as a Limitation on Free Speech Rights*, 97 VA. L. REV. 567, 573 (2011) [hereinafter Volokh, *"Public Discourse"*]. Post believes that this criticism overstates the case. Post, *Reply*, *supra* note 3, at 622.

54. *See infra* notes 72–75 and accompanying text.

55. POST, *supra* note 1, at 15.

56. Post, *Participatory Democracy*, *supra* note 3, at 486. Post has noted elsewhere that "the very concept of a medium for the communication of ideas can be defined only by reference to the particular problems of public discourse." Post, *Recuperating*, *supra* note 4, at 1259.

57. Baker, *supra* note 48, at 517 (noting that under Post's theory, "content should not be relevant" (citing Post, *Participatory Democracy*, *supra* note 3, at 486)).

58. Post, *Participatory Democracy*, *supra* note 3, at 486.

59. POST, *supra* note 1, at 15.

60. Post, *Recuperating*, *supra* note 4, at 1276–77 ("Instead of aspiring to articulate abstract characteristics of speech, doctrine ought to identify discrete forms of social order that are imbued with constitutional value, and it ought to clarify and safeguard the ways in which speech facilitates that constitutional value.").

61. *Id.* at 1278–79 ("Off on a quixotic search for the meaning of such concepts as 'listeners' reactions,' the Court has once again failed to examine the particular social practices that actually give constitutional significance to its decisions." (citation omitted)).

62. Post, *Reply*, *supra* note 3, at 622.

In sum, First Amendment values "do not attach to abstract acts of communication as such, but rather to the social contexts that envelop and give constitutional significance to acts of communication."[63]

The emphasis on context—what this Essay has called social practices—is prominent throughout Post's work, and separates him even from other scholars who believe that participatory democracy is the primary value of the First Amendment. James Weinstein, for example, agrees with Post about the central values of the First Amendment,[64] but defines public discourse as consisting of "speech on matters of public concern, *or*, largely without respect to its subject matter, of expression in settings dedicated or essential to democratic self-governance."[65] Post appears to omit, or at least de-emphasize, the content variable.[66] And as he points out, hints of such a context-based approach can be found in the U.S. Supreme Court's conclusion that First Amendment coverage extends to practices that form a "significant medium for the communication of ideas,"[67] even if the specific communication at issue does not successfully convey a particularized message.[68]

Defining public discourse—and therefore the boundaries of democratic legitimation—based on context avoids some of the problems of the content-based approach, but raises problems of its own. One root complication is determining which contexts should be considered constitutive of public discourse and why. One possible answer is that public discourse consists of protected social practices such as print media. But that only begs the question of why those media (i.e., contexts) are protected while others are not, particularly because media of communication are so often changing. And it is unsatisfactory to say that they are protected because they constitute public discourse. That would be fully circular—the equivalent of saying that public discourse is protected because it consists of certain valuable social practices, and that those social practices are valuable because they constitute public discourse. Post occasionally seems to drift in that direction. For

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63. Post, *Recuperating*, *supra* note 4, at 1255; *see also* Post, *Participatory Democracy*, *supra* note 3, at 477–78 ("[T]he First Amendment does not and should not protect 'speech as such,' as Justice Souter once put it." (citing Glickman v. Wileman Bros. & Elliot, Inc., 521 U.S. 457, 478 (1997) (Souter, J., dissenting))).

64. *See* James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 497 (2011) ("[T]he value that best explains the pattern of free speech decisions is a commitment to democratic self-governance.").

65. *Id.* at 493 (emphasis added).

66. *See* Baker, *supra* note 48, at 517 (noting the "added content criterion" in Weinstein's theory).

67. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952).

68. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995).

example, he has argued that "[s]peech is typically categorized as within or as outside of public discourse according to whether it occurs within social relationships that are regarded as requiring autonomy or interdependence."[69] As Edwin Baker recognized, this "creates some danger of circularity," because "one suspects that Post would say that the relevant 'political' conception of autonomy makes whether a person is '[w]ithin public discourse' determinative of whether she should 'be regarded as autonomous.'"[70]

To be (relatively) clear, this circularity arises from the relationship between the concepts of public discourse and social practices, not necessarily from the concept of democratic legitimation itself. Indeed, one way to avoid the circularity is to focus directly on the value of democratic legitimation, extending constitutional protection to speech acts whose content is "normatively necessary for influencing public opinion."[71] Public discourse and protected social practices would then be defined as those contexts in which such speech is found. This may be consistent with current First Amendment doctrine. Indeed, Post has noted that "[c]ontemporary doctrine delineates the domain of public discourse primarily through an assessment of the content of speech."[72] According to the U.S. Supreme Court, "[s]peech deals with matters of public concern," and is therefore entitled to more "rigorous" protection than "matters of purely private significance,"[73] when it can be "fairly considered as relating to any matter of political, social, or other concern to the community or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public."[74] The context, setting, and medium of the speech act seem relevant to this analysis[75] only insofar as they suggest something about the content of the speech.

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69. Post, *Participatory Democracy*, *supra* note 3, at 483.

70. Baker, *supra* note 48, at 516; Post, *Participatory Democracy*, *supra* note 3, at 484.

71. POST, *supra* note 1, at 18.

72. Post, *Public Discourse*, *supra* note 2, at 667. This assessment is now more than twenty years old, but recent cases like *Snyder v. Phelps*, 562 U.S.__, 131 S. Ct. 1207 (2011), reinforce the fact that content—along with "form" and "context"—remains a touchstone of the Court's analysis. *Id.* at 1215.

73. *Snyder*, 131 S. Ct. at 1215–16; *see also* Connick v. Myers, 461 U.S. 138, 145 (1983); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982). By contrast, the Court has said that the First Amendment denies protection to speech on matters of "purely private concern." Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985) (plurality opinion).

74. *Snyder*, 131 S. Ct. at 1216 (citations omitted) (internal quotation marks omitted).

75. *Dun & Bradstreet*, 472 U.S. at 761 (concluding that the inquiry of "whether . . . speech addresses a matter of public concern must be determined by . . . content, form, and context . . . as revealed by the whole record" (quoting *Connick*, 461 U.S. at 147–48)).

Post rejects this content-based approach, concluding that in practice it has proven "ultimately inadequate and self-contradictory."[76] It is also hard to see how such an approach would give any weight to public discourse and protected social practices. If speech's content determines whether it is entitled to First Amendment protection, public discourse and protected social practices are simply conclusory labels, and do no actual work. That is, if a speech act has been determined normatively necessary for influencing public opinion, it is already, by definition, entitled to constitutional protection under the principle of democratic legitimation. Calling it public discourse would simply be an additional label, one that reflects the relevant analysis but does not influence it.

There is, however, a third way to conceptualize the relationships between public discourse, social practices, and democratic legitimation—one that gives weight to both content and context. In this view, social practices and public discourse serve as *proxies* for speech that further the value of democratic legitimation. Social practices are protected precisely because the content of speech within them is generally thought normatively necessary for influencing public opinion. Collectively, those social practices define the boundaries of public discourse. Speech acts occurring within public discourse presumptively further the value of democratic legitimation and are therefore entitled to First Amendment protection.[77] Whether particular social practices contain such speech would be open to reevaluation over time.[78] This approach would allow public discourse to carry weight in the analysis, but would tie its relevance to the value of democratic legitimation.

Naturally, the proxy approach has complications of its own. Eugene Volokh raises one such complication when he argues that "defining the

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76. Post, *Public Discourse*, *supra* note 2, at 675.

77. I take Post to be arguing something similar when he says that each instance of speech in a protected medium should "presumptively" be protected "absen[t] . . . strong countervailing reasons." POST, *supra* note 1, at 20. But his point seems to be an argument about the conditions under which speech in public discourse can be regulated (a question of protection) rather than, as I argue here, the conditions under which speech is recognized as being part of public discourse in the first place (a question of coverage).

78. Such an approach would have much in common with the "institutional" approach to the First Amendment, which is premised on the idea that theory and doctrine should take note of the mediating institutions such as schools and the press that create and regulate speech. *See* PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS (forthcoming Harvard University Press 2012) (describing the institutional approach); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005) (same); *see also* Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821 (2008) (same). Post himself seems to disclaim the relationship, however, saying that the "premise of the institutional approach" is "implausible." POST, *supra* note 1, at 51.

medium by what is shown in it . . . eliminat[es] the utility of medium as a proxy for the public discourse status of 'each instance' of the medium."[79] The thrust of this criticism is accurate, but not its conclusion. Defining protected forms of communication based on whether they contain protected content does raise the possibility that the value of the proxy will collapse. But that does not eliminate the proxy's utility. If newspapers are considered protected media because they generally contain material that is thought normatively necessary to the formation of public opinion, the medium has been defined and protected based on what is shown in it. Nonetheless, in future cases, each instance of the medium could be presumptively protected without referring back to that content. That is the basic mechanism of all rules and categories,[80] and indeed is the heart of the "definitional balancing" approach to the First Amendment.[81]

Moreover, the medium-as-proxy approach could display varying degrees of rigidity. If implemented in strict, rule-like fashion, it would mean strictly "presum[ing]"[82] First Amendment coverage for speech acts within certain contexts or media. Those contexts and media could themselves be established by direct reference to whether speech within them is generally thought "normatively necessary" to the formation of public opinion.[83] But in any individual case, courts would not ask whether the *particular* speech act at issue furthered that value.[84] If implemented in a more standard-like fashion, the medium-as-proxy approach would simply create a rebuttable presumption that a speech act in a protected medium has content that furthers the value of democratic legitimation. The strength of that presumption could vary depending on the medium.

Of course, all proxies are both under- and over-broad. Basing First

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79. Volokh, *"Public Discourse," supra* note 53, at 584.

80. *See, e.g.*, Kathleen Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992); *see also* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375 (2009).

81. *See generally* Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1184–85 (1970) (describing definitional balancing approach).

82. Post, *Participatory Democracy*, *supra* note 3, at 483.

83. POST, *supra* note 1, at 18.

84. *Cf.* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995) ("[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a particularized message, would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll." (citation omitted) (internal quotation marks omitted)).

Amendment protection on context and social practices rather than individual speech acts would sometimes mean denying First Amendment coverage to speech acts occurring outside of traditionally recognized media of public discourse, even if their content would contribute to the formation of public opinion. It would also mean protecting speech acts based solely on the fact that they occur within a medium that frequently includes messages that do further constitutional values. The proxy would be an imperfect but implementable placeholder for constitutionally valuable speech. That principled but pragmatic approach seems consistent with the "fundamental aspiration" of Post's work, which he has described as providing "an account of First Amendment doctrine that gives 'considerable weight to ease of explanation and comprehension, feasibility of implementation in an imperfect institutional environment.'"[85] That leads inevitably to "a certain degree of pragmatic simplification."[86] It also demands a kind of "reflective equilibrium" in which constitutional ideals and history are measured against one another.[87] And perhaps the best way to illustrate that and the other issues raised here is by considering the First Amendment's treatment of the press, which as Post has argued is deeply bound up with the concept and practice of public discourse.

B. Democratic Legitimation and the Press

The relationships between democratic legitimation, public discourse, and protected social practices are important in Post's theory not simply for taxonomic purposes, but because constitutional coverage depends on their presence. The previous Part highlighted some conceptual difficulties with that relationship. This Part attempts, as Post urges, to evaluate it in light of "our historical commitments and principles."[88]

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85. Post, *Reply*, *supra* note 3, at 617 (citing Vincent Blasi, *Democratic Participation and the Freedom of Speech: A Response to Post and Weinstein*, 97 VA. L. REV. 531, 531 (2011)).

86. *Id.*

87. POST, *supra* note 1, at 5 ("We can . . . aspire to what John Rawls has termed 'considered judgment in reflective equilibrium.'" (citing JOHN RAWLS, A THEORY OF JUSTICE 46–49 (1971))); Post, *Participatory Democracy*, *supra* note 3, at 477 ("Determining the meaning of this commitment [to protect freedom of speech] involves reflective equilibrium; it requires us to interpret our history in light of our best ideals while simultaneously reexamining our ideals in light of our actual history.").

88. Post, *Reply*, *supra* note 3, at 618 ("Because law typically acquires authority from the commitments and principles of those whom it seeks to govern, I have sought to identify this fundamental purpose by inquiring into our historical commitments and principles." (citing Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CALIF. L. REV. 1473, 1474 (2007))).

Specifically, it asks how his theory can account for constitutional coverage of the press.

Post accords constitutional protection to the press first and most prominently based on the democratic legitimation grounds sketched out above.[89] The press, on this account, has a "unique" claim to First Amendment coverage because it—or rather the media through which it acts—helps form the public sphere.[90] Indeed, Post argues that the public sphere took shape as a result of "the development of affordable and widely dispersed printed material, like books and newspapers," which permitted strangers to "communicate systematically and regularly with each other."[91] It follows that "[m]edia like newspapers are major components of this structure and indeed are the historical grounds for its emergence. This is why First Amendment doctrine typically regards communication within recognized media as presumptively within public discourse and hence within the scope of the First Amendment."[92] Indeed, the U.S. Supreme Court has often referred to the importance of the press—a term which, significantly, is used interchangeably with "the media"—in creating and maintaining public discourse or, as the Court explained in *First National Bank of Boston v. Bellotti*,[93] "providing a forum for discussion and debate."[94]

Straightforward as it seems, however, this explanation raises a few potential complications. First is the context–content issue described in Part I.A. Post argued more than twenty years ago that "media speech, *simply by virtue of the manner of its distribution*, presents a strong prima facie claim to be classified as public discourse."[95] This is of course a claim based on context rather than content, and therefore raises the circularity problems discussed above. Those problems are exacerbated with regard to the press, given its central role in creating the public

89. Part II of this Essay considers whether the value of democratic competence might also be applicable.

90. Post, *Public Discourse*, *supra* note 2, at 678 ("Media speech is thus unique because it carries within it this prima facie claim to constitute public discourse, a claim based entirely on the manner of its distribution rather than its content.").

91. POST, *supra* note 1, at 18; *see also id.* at 20 ("First Amendment coverage presumptively extends to media for the communication of ideas, like newspapers, magazines, the Internet, or cinema, which are the primary vehicles for the circulation of the texts that define and sustain the public sphere. In the absence of strong countervailing reasons, whatever is said within such media is covered by the First Amendment." (footnote omitted)).

92. Post, *Participatory Democracy*, *supra* note 3, at 486.

93. 435 U.S. 765 (1978).

94. *Id.* at 781.

95. Post, *Public Discourse*, *supra* note 2, at 677–78 (emphasis added).

sphere. If media like newspapers effectively created public discourse, as Post argues, it seems unsatisfying to protect them simply on the basis that they are part of it. It may well be true that "[t]he emergence of the mass media and of the 'public' are mutually constructive developments."[96] However, that does not mean that the constitutional value of each can be rooted in the other.

Second, as a matter of existing doctrine, it is simply not the case that all communications occurring in traditional media are given complete protection. A newspaper that prints libelous statements about private figures cannot claim constitutional immunity to tort,[97] even though newspapers are "the primary vehicles for the circulation of the texts that define and sustain the public sphere."[98] Similarly, advertisements may be treated like commercial speech—and thus receive less-than-full First Amendment protection[99]—even when they appear in newspapers or magazines. Moreover, copyright laws are constitutional notwithstanding the fact that copyright-infringing speech often occurs within the traditional media that constitute public discourse.[100]

These examples of unprotected speech in what would appear to be public discourse present some difficulties for Post's theory, because its stated aim is to reflect doctrine as well as to shape it.[101] As he notes, "[t]o determine the purposes of the First Amendment, therefore, we must consult the actual shape of entrenched First Amendment jurisprudence."[102] If entrenched First Amendment jurisprudence does not actually extend protection to "each instance of the [protected] medium"[103] of newspapers or other media through which the press

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96. *Id.* at 635 (quoting ALVIN GOULDNER, THE DIALECTIC OF IDEOLOGY AND TECHNOLOGY: THE ORIGINS, GRAMMAR, AND FUTURE OF IDEOLOGY 106 (1976)).

97. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (permitting private individuals to pursue defamation claims so long as negligence is proven).

98. POST, *supra* note 1, at 20.

99. *Id.* at 41–44. Post himself clarifies that commercial speech serves the value of democratic competence rather than democratic legitimation. *Id.* at 43.

100. Volokh, *"Public Discourse," supra* note 53, at 567–71; *see also id.* at 582 ("Securities law regulates, among other things, the contents of advertisements published in newspapers and magazines, as well as self-published pamphlets. Yet much obvious 'public discourse' is likewise published in newspapers, magazines, advertisements in those newspapers and magazines . . . and self-published pamphlets.").

101. POST, *supra* note 1, at 4; *see also* Post, *Reply*, *supra* note 3, at 617–18.

102. POST, *supra* note 1, at 5; *see also* Seana Valentine Shiffrin, *Methodology in Free Speech Theory*, 97 VA. L. REV. 549, 549 (2011) (reading Post's theory as attempting to "provide the theoretical foundations to understand our existing practices, cases, and our historical traditions and thereby offer explanatory and justificatory cohesion for them").

103. Post, *Recuperating*, *supra* note 4, at 1253.

traditionally communicates, it seems wrong to treat the press as a social practice constitutive of public discourse (which is, by definition, presumptively protected).

This problem is not unfamiliar to Post, however, and he has many potential responses to it. He has previously recognized that the media's claim to First Amendment protection "is defeasible; obscene speech, for example, can be distributed through the mass media. But the existence and strength of the claim [of constitutional protection] makes the exclusion of media speech from public discourse difficult and controversial."[104] Perhaps these categories of speech are unprotected, even when conducted through mass media, precisely because they present the kinds of "strong countervailing reasons" sufficient to overcome the presumption of protection that attaches to the traditional mechanisms of public discourse.[105] That explanation itself raises a host of difficult questions about what counts as a countervailing reason—Lack of contribution to public discourse? Inequality of parties?—but it does help make sense of existing doctrine. Post might also say that the First Amendment's treatment of some uncovered press activities—defamation and obscenity, for example—represents an effort to mediate community values with those of public discourse.[106] But that response also raises further complications. Among other things, it means allowing traditional social biases to define the boundaries of public discourse,[107] which as Post recognizes is itself a form of speech regulation.[108]

A third potential problem with treating the press as constitutive of public discourse is that despite the seemingly strong support for press protection that Post's theory and other sources provide, First Amendment doctrine does not reflect special solicitude for the press. The text of the First Amendment singles out the "press" for protection,[109] of course, and the press has historically played a crucial

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104. Post, *Public Discourse*, *supra* note 2, at 678.

105. POST, *supra* note 1, at 20.

106. *See generally* Post, *Public Discourse*, *supra* note 2; Robert Post, *Community and the First Amendment*, 29 ARIZ. ST. L.J. 473 (1997) [hereinafter Post, *Community*].

107. Redish & Mollen, *supra* note 51, at 1350 ("The theoretical inconsistency of this result is notable: after consistently undervaluing and underprotecting speech by ignoring its possible value to the audience, Post gives the audience's perceived social norms a central role in justifying suppression of speech by allowing community norms to define the boundaries of the public discourse.").

108. *See* sources cited *supra* note 51.

109. Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1028 (2011) ("Writing off the Press Clause as nothing more than the framers' gentle reminder that we all have a right to publish our speech is problematic on several levels.").

role in creating and maintaining the public sphere.[110] As the U.S. Supreme Court has noted, "[t]he Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, to play an important role in the discussion of public affairs."[111] If, as Post argues, such activities and forms of communication actually created the public sphere,[112] shouldn't they be accorded heightened constitutional protection? At the very least, it would seem that First Amendment doctrine should extend protection to core press activities like claims of privilege and access to information.[113]

Yet First Amendment doctrine does not necessarily cover these activities, and indeed gives few legal protections to the press as such.[114] *Branzburg v. Hayes*[115] is exemplary. In that case, the Court recognized that "news gathering is not without its First Amendment protections,"[116] a careful phrase that might suggest, but does not actually deliver, a special set of constitutional protections for the press. Specifically, the Court declined to give journalists a First Amendment right to withhold information about confidential sources from a grand jury investigating criminal behavior.[117] Similarly, in *Richmond Newspapers, Inc. v. Virginia*,[118] the Court ringingly endorsed the notion that "without some protection for seeking out the news, freedom of the press could be eviscerated."[119] But even as it recognized a general constitutional right of public access to certain kinds of judicial proceedings, the Court did not give the press any greater share of that right than the public at large.[120]

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110. *See supra* notes 91–94 and accompanying text.

111. Mills v. Alabama, 384 U.S. 214, 219 (1966) (citations omitted).

112. POST, *supra* note 1, at 18; *see also id.* at 20.

113. *See* Vincent Blasi, *Democratic Participation and the Freedom of Speech: A Response to Post and Weinstein*, 97 VA. L. REV. 531, 534 (2011) ("A First Amendment that valued participation in public discourse above all else would, I should think, recognize an access right of the sort proposed by Jerome Barron and roundly rejected by the Court.").

114. West, *supra* note 109, at 1028 ("The Supreme Court occasionally offers up rhetoric on the value of the free press, but it steadfastly refuses to explicitly recognize any right or protection as emanating solely from the Press Clause.").

115. 408 U.S. 665 (1972).

116. *Id.* at 707.

117. *Id.* at 690–91.

118. 448 U.S. 555 (1980) (plurality opinion).

119. *Id.* at 576 (quoting *Branzburg*, 408 U.S. at 681).

120. *Id.* at 577 n.12 ("[M]edia . . . representatives are entitled to the same [right of access to criminal trials] as the general public." (internal quotation marks omitted)); *see also* Citizens United v. FEC, 558 U.S.__, 130 S. Ct. 876, 905 (2010) ("We have consistently rejected the proposition that

The result of this, doctrinally, is that the press *as such* receives no constitutional protection, but receives First Amendment coverage for the same reasons and to the same degree as other speakers in public discourse. As Post explains:

> Media speech is . . . unique because it carries within it this prima facie claim to constitute public discourse, a claim based entirely on the manner of its distribution rather than on its content. This singularity explains the Court's continual attraction to a distinction between media and nonmedia defendants. But on close inspection the uniqueness of media speech lies only in the particular way in which it grounds its claim to be public discourse, a claim whose substance it shares with many other kinds of communication.[121]

This explanation is descriptively accurate, and yet somewhat unsatisfying. Even if other forms of speech employ similar manners of distribution, the very fact that media speech is, by Post's reckoning, "unique," suggests that it should be treated differently. Perhaps Post would say that his book is focused on the limits of First Amendment coverage rather than the degree of protection it bestows,[122] and thus that the question of whether the press should receive heightened protection is simply beyond his scope. But that, too, is unsatisfying, because First Amendment doctrine includes widely varying tests for different kinds of covered speech.[123] Given that Post's stated aim is to account for the shape of current doctrine,[124] the issue of differential coverage would seem to fall squarely within his reach.

A fourth and related difficulty with First Amendment treatment of the press is not specific to Post's theory, but may highlight another complication with it. That is the intractable problem of determining who or what counts as the press—a task whose difficulty might explain why the press is not given special treatment in current First Amendment doctrine.[125] It is made all the more acute by the changing nature, role,

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the institutional press has any constitutional privilege beyond that of other speakers." (citation omitted) (internal quotation marks omitted)); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 784 (1985) (Brennan, J., dissenting) ("[T]he rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities.").

121. Post, *Public Discourse*, *supra* note 2, at 678.

122. *See* POST, *supra* note 1, at 1, 96.

123. *See generally* Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 31 VAND. L. REV. 265 (1982) (exploring differences between coverage and protection).

124. *See* sources cited *supra* note 36.

125. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 801 (1978) (Burger, C.J., concurring) ("[A]

and mechanisms of the press. Chief among these, perhaps, is the easy accessibility of publication, for example on the Internet. If we are all journalists now,[126] maybe there is no point in creating special protection for the press. In fact, extending First Amendment protection to particular forms of communication traditionally employed by the institutional press could exacerbate problems of over- and under-breadth. The characteristic media associated with the press—newspapers and magazines, among others[127]—often convey information that is not in any real sense a matter of public discourse. Commercial advertisements, for example, appear in traditional media and yet do not serve the value of democratic legitimation.[128] Conversely, a focus on traditional media would fail to capture many modern means of maintaining the public sphere. In the recent democratic revolutions across the Middle East, for example, social media such as Twitter—"traditional" only in the loosest sense of the term—effectively functioned as the press.[129]

These definitional difficulties are not unique to the press, of course. Many organizations doing business under the name "university" are devoted to the pursuit of some particular political or social end other than the creation of knowledge. Post concludes that "[f]rom a constitutional point of view, . . . academic freedom has nothing to do with the autonomy of institutions that happen to include the name 'university' in their titles."[130] Rather, it covers only "institutions that facilitate the application and improvement of professional scholarly standards to advance knowledge for the public good."[131] Perhaps

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fundamental difficulty with interpreting the Press Clause as conferring special status on a limited group is one of definition."); Branzburg v. Hayes, 408 U.S. 665, 703–04 (1972). *But see* Floyd Abrams, *The Press Is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563, 580 (1979) ("In the great preponderance of cases, a court has little difficulty knowing a journalist when it sees one.").

126. *See generally* SCOTT GANT, WE'RE ALL JOURNALISTS NOW: THE TRANSFORMATIONS OF THE PRESS AND RESHAPING OF THE LAW IN THE INTERNET AGE (2007); DAN GILLMOR, WE THE MEDIA: GRASSROOTS JOURNALISM BY THE PEOPLE, FOR THE PEOPLE (2d ed. 2006).

127. *See* POST, *supra* note 1, at 20 (listing these as among the media traditionally constituting public discourse).

128. *Id.* at 42.

129. *See generally, e.g.*, TWEETS FROM TAHRIR: EGYPT'S REVOLUTION AS IT UNFOLDED, IN THE WORDS OF THE PEOPLE WHO MADE IT (Alex Nunns & Nadia Idle, eds. 2011).

130. POST, *supra* note 1, at 78; *see also id.* at 90 ("True universities that protect academic freedom, and that are accordingly entitled to claim the protection of academic freedom, are . . . dedicated to the disciplinary diffusion of knowledge and to the disciplinary discovery of new knowledge. It is only in such circumstances that universities serve the constitutional value of democratic competence.").

131. *Id.* at 78.

"journalists" are only entitled to First Amendment protection when and to the degree they respect the norms and rules of the discipline.[132] But defining protected media based on their disciplinarity is an answer grounded in the value of democratic competence, not democratic legitimation. Indeed, the very idea of disciplinarity is antithetical to the notion of democratic legitimation. The following Part explores this interaction.

II. EXPERT KNOWLEDGE AND THE PRESS

Though democratic legitimation is the cardinal value in Post's theory of free speech,[133] his book's cardinal contribution may be its exploration of a different and in some sense contradictory value: democratic competence. This value, he says, "refers to the cognitive empowerment of persons within public discourse, which in part depends on their access to disciplinary knowledge."[134] Indeed, what sets his work apart from any other thoroughly elaborated First Amendment theory is the serious attention it pays to the production of expert knowledge through means that are hard to reconcile with familiar First Amendment principles. Yet Post does not focus as much attention on related and important questions such as how expert knowledge is disseminated *into* public discourse, how it is or should be treated once it arrives there, whether knowledge dissemination itself requires disciplinarity, and what institutions and social practices besides universities are engaged in disseminating expert knowledge. Part II.A addresses some of these questions. Part II.B suggests that perhaps the press, as a disseminator and occasional producer of expert knowledge, should be entitled to constitutional protection under the principle of democratic competence.

A. Expert Knowledge in Public Discourse

As Post notes, intelligent self-governance requires expert knowledge.[135] It follows that "[r]eliable expert knowledge is necessary

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132. *Cf.* Robert D. Sack, *Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press*, 7 HOFSTRA L. REV. 629, 629 (1979) ("[A]ll citizens exercising the press *function*, including, but not limited to, journalists employed by the 'institutional press,' warrant . . . protection." (emphasis in original)).

133. POST, *supra* note 1, at 37 ("[T]he value of democratic legitimation trumps that of democratic competence.").

134. *Id.* at 33–34.

135. *Id.* at 32 ("Expert knowledge is prerequisite for intelligent self-governance."); *see also id.* at 34 ("Cognitive empowerment is necessary both for intelligent self-governance and for the value of democratic legitimation."); *id.* at ix ("Any modern society needs expert knowledge in order to

not only for intelligent self-governance, but also for the very value of democratic legitimation."[136] This simple fact raises a significant problem for the First Amendment. Expert knowledge "can be produced only if the norms and practices of a discipline are observed,"[137] and "[t]he continuous discipline of peer judgment, which virtually defines expert knowledge, is quite incompatible with deep and fundamental First Amendment doctrines" such as those governing viewpoint and content neutrality.[138] Thus "[i]f expert knowledge depends upon the preservation of disciplines, and if disciplines require maintenance of 'proper and orderly action,' the very independence jealously safeguarded by the First Amendment is in tension with the production of expert knowledge."[139] Post concludes that "[b]y maintaining a continuous tension between state authority to regulate expert knowledge practices on the one hand, and the relative constitutional autonomy of such knowledge practices on the other, we recognize and honor the need to negotiate between these two important social needs."[140]

But negotiating between those two social needs, as opposed to simply embracing their incompatibility, requires accounting for how expert knowledge is disseminated into public discourse and how it is or should be treated once it arrives. These are essential questions, for the very value of democratic competence depends on the role of expert knowledge *in* public discourse. As Post argues, "[d]emocratic competence refers to the cognitive empowerment of persons *within* public discourse, which in part depends on their access to disciplinary knowledge."[141] The U.S. Supreme Court has similarly explained that it interprets the First Amendment with the goal of "securing , , , an informed and educated public opinion with respect to a matter which is of public concern."[142]

Post devotes the second chapter of the book to the question of "whether we can discern distinct First Amendment doctrines designed to

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survive and prosper."); *id.* at 35 ("[A]n educated and informed public opinion will more intelligently and effectively supervise the government.").

136. *Id.* at 32–33.

137. *Id.* at xi.

138. *Id.* at 9; *see also id.* at 31 ("The creation of reliable disciplinary knowledge must accordingly be relegated to institutions that are not controlled by the constitutional value of democratic legitimation.").

139. *Id.* at xiii.

140. *Id.* at 98–99.

141. *Id.* at 33–34 (emphasis added).

142. Thornhill v. Alabama, 310 U.S. 88, 104 (1940).

protect the social practices that produce and distribute disciplinary knowledge."[143] In answering that question, he focuses primarily on commercial speech doctrine, "which vigorously protects the dissemination of factual information outside of public discourse."[144] That doctrine is also "antithetical to First Amendment protections for public discourse,"[145] because, among other things, it permits speech to be limited on the basis of its truthfulness. Post concludes that "[c]onstitutional protections for the dissemination of expert knowledge should . . . be roughly analogous to those applicable to the circulation of commercial information."[146] And "[i]f we wish to make visible our existing constitutional instincts in this area, we must scrutinize domains *outside* of public discourse."[147]

The harder question, however, is how the First Amendment should treat the dissemination of expert knowledge *into* or *within* public discourse. One answer might be that the dissemination of expert knowledge into public discourse is itself a form of public discourse. But Post does not seem to believe this. He writes that "classrooms are a primary medium for the transmission of scholarly expertise to the public,"[148] and yet "[t]he classroom is not a location in which the value of democratic legitimation is at stake."[149] This only makes sense if media through which expertise is transmitted to the public are not necessarily part of public discourse.

Moreover, at a conceptual level, there are good reasons to think that, under Post's theory, the dissemination of expert knowledge should not itself be treated as a form of public discourse—at least not automatically. We do not value expert knowledge, or its dissemination, on the basis of

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143. POST, *supra* note 1, at 33.

144. *Id.* at 34–35.

145. *Id.* at 43.

146. *Id.*

147. *Id.* (emphasis added). It is possible, of course, that modern doctrine is simply wrong to treat commercial speech as being outside of public discourse. Indeed, by Post's own description, "commercial speech tends to be addressed to the general public in advertisements that are placed in newspapers or radio or other media that are widely distributed." *Id.* at 46. But this is an argument Post has addressed elsewhere and at length, and I will not revisit it here. *See* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 18 (2000) (concluding that commercial speech falls outside of public discourse because it "should be understood as an effort . . . simply to sell products" and not "to engage public opinion"); *see also* Redish & Mollen, *supra* note 51, at 1346 (criticizing this argument).

148. POST, *supra* note 1, at 88.

149. *Id.* at 70; *see also id.* at 83 ("In these lectures Sweezy did not play the role of a citizen; he was not participating in public discourse. He was an expert communicating knowledge to his students and thereby to the public." (citation omitted)).

experts' interest in experiencing authorship of the laws that bind them, as an emphasis on public discourse would suggest.[150] Rather, we value the dissemination of expert knowledge precisely to the degree that it informs listeners. And that is a value that public discourse and the principle of democratic legitimation struggle to capture.

Perhaps instead dissemination of expert knowledge counts, at least presumptively, as public discourse when it occurs through the social practices traditionally recognized as constituting public discourse: newspapers, magazines, and the like. As Post explains:

> [C]ommunication of expert knowledge within public discourse is typically protected by the value of democratic legitimation, which can obscure the distinct protections inspired by democratic competence. If an expert chooses to participate in public discourse by speaking about matters within her expertise, her speech will characteristically be classified as fully protected opinion.[151]

But that simply highlights the problem, for public discourse does not recognize truth,[152] let alone expert knowledge. All people can claim expertise in public discourse, whether or not the "knowledge" they transmit is a product of disciplinarity.[153] As Post's account reveals, their speech "will characteristically be classified as fully protected *opinion.*"[154] That is fine so far as it goes, but absent some endorsement of a marketplace-of-ideas rationale, it is hard to see how transmuting knowledge to opinion aids the dissemination of knowledge.

The difficult question, therefore, is how expert knowledge can retain its character in public discourse. It is not enough to "maintain[] separation between the 'sphere of knowledge' and the 'sphere of power,'"[155] for the value of democratic competence lies precisely in the fact that (expert) knowledge informs (governing) power. One possibility, of course, would be for law to take an active role in separating fact from opinion and protecting claims of expert knowledge, even in public

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150. *See supra* notes 32–33 and accompanying text.

151. POST, *supra* note 1, at 43; *see also* Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939 *passim* (exploring the distinction between a dentist who publicly argues against the use of amalgams, thereby engaging in public discourse, from the dentist who privately counsels her patients to avoid them, thereby speaking outside of public discourse and subject to sanction).

152. *Supra* note 45 and accompanying text.

153. POST, *supra* note 1, at 44 ("Members of the general public can rely on expert pronouncements within public discourse only at their peril.").

154. *Id.* at 43 (emphasis added).

155. *Id.* at 59.

discourse. After all, "the value of democratic competence can be judicially protected only if courts incorporate and apply the disciplinary methods by which expert knowledge is defined."[156] Having done that, and thereby effectively given a legal advantage to disciplinary knowledge—an advantage which must matter, else Post would not advocate it—why not simply continue to do so even as the knowledge moves in public discourse?

The fact that Post rejects this option reflects his belief that democratic legitimation trumps democratic competence, at least in public discourse. Within public discourse, he says, the state may not "enforce the disciplinary methods that make expert knowledge reliable."[157] When the press operates within public discourse, for example, any checks on its speech must be extra-legal: "Biologists can with impunity write editorials in the *New York Times* that are such poor science that they would constitute grounds for denying tenure within a university. . . . Such pronouncements are ultimately subject to political rather than legal accountability."[158] This is in keeping with the basic theory and value of democratic legitimation.

But in order for democratic competence to succeed on its own terms, there must be *some* method of accountability, legal or otherwise, for claims of expertise in public discourse. Without more—that is, without an account of why and how people in public discourse will be able to separate truth and expert knowledge from falsehood and chicanery—the basic premise that expert knowledge will inform participatory democracy will fail. A First Amendment theory predicated on the value of expert knowledge in public discourse must have some way to account for how that truthful expertise will be transmitted.

One answer would be to posit a hard line between expert knowledge and public discourse, such that the two co-exist but never interact. Perhaps individuals accumulate expert knowledge outside of public discourse and then enter into public discourse, where their previous accumulation of knowledge improves their ability to engage. On this account, expert knowledge would never really be a part of public discourse, but a part of preparation to engage in such discourse. Post seems to have this in mind when he explores commercial speech doctrine, which concerns "the circulation of information *outside* of public discourse,"[159] but is worthy of First Amendment coverage

156. *Id.* at 54.

157. *Id.* at 44.

158. *Id.*

159. *Id.* at 59 (emphasis added).

because it "prevents the state from obliterating independent sources of expert knowledge"[160] while "empower[ing] democratic citizens to demand accountability from their government."[161]

This is a very attractive explanation. Equipping people to understand and evaluate concepts in public discourse is obviously important, and surely there is First Amendment value in encouraging individual cognitive development outside of public discourse. But it seems hard to maintain the division between expert knowledge "in" public discourse and expert knowledge "before" public discourse. If the point of knowledge is to inform public discourse, at some point it must enter into it. Post says, for example, that the restriction on attorney–client communications that the U.S. Supreme Court considered in *Milavetz, Gallop & Milavetz, P.A. v. United States*[162] can be understood to trigger First Amendment coverage because "its purpose and effect was to block the communication of knowledge that might ultimately inform public opinion and thereby enhance the competency of democratic decision-making" even though "this knowledge is communicated outside public discourse."[163]

This leads to a second and related potential answer to the question of how expert knowledge can prove valuable in public discourse: Such knowledge will be recognized for what it is, and will gain acceptance over less worthy claims. This is, of course, a version of the marketplace-of-ideas metaphor, which suggests that free speech is valuable precisely because truth will ultimately win out in competition with falsehood.[164] Though participatory democracy is Post's primary First Amendment principle, he also believes that the marketplace metaphor captures

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160. *Id.*

161. *Id.* at 60.

162. 559 U.S.__, 130 S. Ct. 1324 (2010). The relevant language provided:

> A debt relief agency shall not (4) advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 11 U.S.C § 526 (a)(4) (2006).

163. POST, *supra* note 1, at 52–53; *see also id.* at 61 ("The value of democratic competence is undermined whenever the state acts to interrupt the communication of disciplinary knowledge that might inform the creation of public opinion.").

164. *See also* Eugene Volokh, *In Defense of the Marketplace of Ideas/Search for Truth as a Theory of Free Speech Protection*, 97 VA. L. REV. 595, 595 (2011) ("[N]early all speech restrictions that interfere with the search for truth also interfere with the right to 'participate in the formation of public opinion.'"); *cf.* JOHN MILTON, AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING 45 (H.B. Cotterill ed., MacMillan & Co. 1959) (1644) ("Let [truth] and falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?").

something important about the value of free speech. He notes at the outset of the book, "I focus on the marketplace of ideas from a slightly different angle. I inquire into the relationship between the marketplace of ideas and the *production* of expert knowledge."[165]

But this interpretation relies on a potentially problematic view of the marketplace of ideas and how individuals within it respond to claims of expertise. Post believes that "[w]e rely on expert 'knowledge' precisely because it has been vetted and reviewed by those whose judgment we have reason to trust."[166] Thus, for example, "[w]e regard scientific beliefs as reliable because they are subject to disciplinary standards of verifiability, reproducibility, falsifiability, and so on."[167] Post goes on to endorse Allen Buchanan's argument for the necessity of "the social identification of experts, that is, epistemic authorities, individuals or groups to whom others defer as reliable sources of true beliefs."[168]

This effort to join democratic competence and public discourse is extremely appealing, but raises conceptual and practical problems. At a conceptual level, the same "unrestrained epistemic egalitarianism" that is "incompatible with the division of epistemic labor necessary for the production of expert knowledge"[169] also seems incompatible with the *identification* of those authorities who are doing the producing. In other words, if public discourse does not permit recognizing expert knowledge, then it is hard to see how it permits recognizing the authorities, institutions, and practices responsible for creating such knowledge.

Moreover, as a practical matter, there is some reason to doubt that people actually do recognize or value claims of expert knowledge in public discourse. As Suzanna Sherry has pointed out, "we have created a society that finds experts unnecessary and even faintly suspect. . . . More people believe in angels than in evolution, and belief in evolution only narrowly surpasses belief in UFOs. Elected officials and candidates publicly deny the validity of facts on which there is scientific consensus."[170] At the very least, this raises serious empirical questions

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165. POST, *supra* note 1, at xi (emphasis added). Again, it is worth noting that Post's emphasis is on the production of knowledge, not its dissemination.

166. *Id.* at 8.

167. *Id.* at 29.

168. *Id.* at 32 (citing Allen Buchanan, *Political Liberalism and Social Epistemology*, 32 PHIL. & PUB. AFF. 95, 103 (2004)).

169. *Id.* at 32 (citations omitted) (internal quotation marks omitted).

170. Suzanna Sherry, *Democracy's Distrust: Contested Values and the Decline of Expertise*, 125 HARV. L. REV. FORUM 7, 10 (2011).

about whether and to what degree expert knowledge actually does inform democratic decision-making. If it does not, Post's faith in the marketplace as a mechanism for joining democratic competence and democratic legitimation is misplaced. The apparent distrust of expert knowledge—surely an important issue for Post's theory—may in fact be a *result* of the failure to recognize disciplinarity. As Sherry puts it, "the main culprit in encouraging resistance to expert knowledge . . . is the democratization of the creation and authoritativeness of knowledge."[171] Rehabilitating faith in expert knowledge may be both an essential goal of Post's theory and a prerequisite for its success.

Another way to mediate the interface between democratic legitimation and democratic competence might be through focusing more specifically on the mechanisms by which expert knowledge is disseminated. If such knowledge can only be created through disciplinarity, perhaps its proper dissemination also requires disciplinarity, at least insofar as the principle of democratic competence is concerned.[172] Indeed, disciplinarity with regard to the transmission of expert knowledge might be particularly important, because the recipients of that knowledge are likely to be less informed than the experts disseminating it, thus eliminating the egalitarian presumption that applies in public discourse.[173] But disseminating expert knowledge implicates different norms and forms of disciplinarity than the production of knowledge. Failed academic enterprises, for example, might not directly contribute to the production of expert knowledge, but they can nonetheless be relevant to its accurate transmission. If a lab has tried ten times to achieve a desired result (desired, perhaps, because it would satisfy a major funder), succeeds on the tenth occasion, and then publishes a paper reporting only the successful result, it has produced expert knowledge. But it has arguably failed to transmit other relevant knowledge—the identity of the funder, the amount of funding, the failure of the previous nine tests, and so on.

The disciplinarity of knowledge-creation within such scholarly settings has been an interest of Post's for many years,[174] and is the

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171. *Id.* at 10; *see also id.* at 11 ("Segments of the American public seem to have domesticated . . . postmodern skepticism by combining it with democratic anti-elitism, ultimately trusting only knowledge that is created by democratic means.").

172. *Cf.* POST, *supra* note 1, at 90 (referring to the "disciplinary diffusion of knowledge").

173. *See generally* Post, *Community*, *supra* note 106; Robert Post, *Democracy and Equality*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 24 (2006).

174. *See, e.g.*, MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM (2009) (describing the historical development and contemporary principles of Amendment academic freedom).

primary focus of his discussion of democratic competence. He argues that "[u]niversities and university faculty are the unique and primary sites in American society for the creation and diffusion of disciplinary knowledge in the service of the public good."[175] The former role—creation of knowledge—seems true enough. But are universities really the primary sites through which such knowledge is "diffuse[d]" into public discourse? Certainly some dissemination of expert knowledge happens through teaching. As noted above, however, Post believes that "[t]he classroom is not a location in which the value of democratic legitimation is at stake."[176] It follows that teaching in university classrooms is not a form of public discourse. But if it is not, when *does* the knowledge transmitted through teaching enter into public discourse? If students debate the day's lecture while walking back to their dormitory, surely they are engaged in public discourse.[177] What if they go to the professor's office to discuss it further, set up an off-campus lunch meeting with her, or relay the lecture's contents to other students not in the class?

Post generally holds aside the role of teaching in the distribution of expert knowledge,[178] focusing instead on research and publication.[179] But there must be social practices other than scholarly research and publication that create and distribute disciplinary knowledge into public discourse.[180] The following Part considers whether the press is one.

B. Democratic Competence and the Press

Part I.B argued among other things that the value of democratic legitimation provides strong but imperfect support for First Amendment protection of the press: strong, because it would give constitutional protection to the press on the basis that it virtually constitutes public

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175. POST, *supra* note 1, at 68; *see also id.* at 63 (referring to the modern university's role in the "dissemination" of knowledge (citations omitted)).

176. *Id.* at 70; *see also id.* at 69 ("These lectures formed no part of public discourse, because Sweezy's relationship to the students in his classroom constituted a professional relationship, analogous to the relationship between a lawyer and her clients.").

177. *But see* Post, *Reply*, *supra* note 3, at 623 (calling it a "close case" whether "family conversations about presidential politics should be protected as public discourse").

178. POST, *supra* note 1, at 70, 77 n.56, 88.

179. *Id.* at 88 (arguing that "research and publication . . . includes the right to disseminate the results of research to the public, including and most especially to students in the classroom"); *see also id.* ("Academic freedom of research and publication must include, at a minimum, the freedom to communicate the results of research to students when it is pedagogically relevant to do so.").

180. *Id.* at 96 ("The practices of astrology and palmistry would not qualify, but those of chemistry, law, and medicine probably would.").

discourse; imperfect, because it cannot fully explain many prominent features of First Amendment doctrine. Nor, for that matter, does it fit well with the usual arguments for constitutional protection of the press—things like informational benefits to readers and the checking function of the press, rather than journalists' autonomy interests, as the democratic legitimation approach would suggest.

Moreover, the democratic legitimation value, standing alone, cannot account for the press's own internal disciplinarity, including basic editing standards. What of those activities that are not themselves part of public discourse, but which are nonetheless necessary for effective dissemination of information—newsgathering, for example? If knowledge dissemination requires its own forms of disciplinarity—of internal regulation, norms, and discipline—then presumably much of what makes knowledge dissemination work occurs outside of public discourse.

These questions suggest that democratic legitimation alone is not enough to account for First Amendment protection of the press. There is some reason to think that democratic competence can help fill the gap, though Post himself does not argue as much. For one thing, the press disseminates knowledge, including expert knowledge. As Justice Powell recognized, "[n]o individual can obtain for himself the information needed for intelligent discharge of his political responsibilities. . . . [The press] is the means by which the people receive that free flow of information and ideas essential to intelligent self-government."[181] Much, though of course not all, of the "information and ideas essential to intelligent self-government" consists of expert knowledge relayed by press pundits. Powell also argued that laws are constitutionally suspect when they "restrain[] the ability of the press to perform its constitutionally established function of informing the people on the conduct of their government."[182] Powell happened to be writing in dissent in both of those cases, but the ideas he expressed have long had broad appeal. In *Branzburg*, for example, the Court concluded that "[t]he function of the press is to explore and investigate events, inform the people what is going on, and to expose the harmful as well as the good influences at work."[183]

In addition to reporting expert knowledge, the press can sometimes produce it. Indeed, the very purpose and function of investigative

181. Saxbe v. Washington Post Co., 417 U.S. 843, 863 (1974) (Powell, J., dissenting).

182. Pell v. Procunier, 417 U.S. 817, 835 (1974) (Powell, J., concurring in part and dissenting in part).

183. Branzburg v. Hayes, 408 U.S. 665, 722 (1972).

journalism is to report previously unknown facts.[184] When Woodward and Bernstein discovered, assembled, and synthesized the Watergate story,[185] or Andrew Ross Sorkin wrote *Too Big to Fail*,[186] they were surely producing knowledge akin to that created by a university-based scholar. Perhaps one might argue that investigative journalism uncovers knowledge, rather than creating it. But that seems too fine a distinction. Scientists, too, are largely in the businesses of uncovering pre-existing facts about the natural world,[187] though no one doubts that by doing so they are adding to the sum total of human knowledge.

Together, these roles—the dissemination and occasional creation of expert knowledge—suggest that the press, like academia, should receive First Amendment protection under the principle of democratic competence. But of course there is another essential ingredient that the press must possess in order to gain protection under the value of democratic competence: disciplinarity. Although the press may not exhibit the same forms of disciplinarity as academia, it does have its own internal rules. Like academia, the press has adopted formalized internal rules and mechanisms of control.[188] Professional trade organizations such as the American Society of Newspaper Editors and the Society of Professional Journalists,[189] as well as by individual newspapers, magazines, and broadcasters create and enforce such rules. Among other things, these disciplinary rules require caution when dealing with sources who request anonymity, and "advise journalists to refuse to reveal confidential sources to any court or investigative entity."[190] Journalists who fail to adhere to these or other rules of the

184. *See* Hugo de Burgh, *Kings Without Crowns? The Re-Emergence of Investigative Journalism in China*, 25 MEDIA, CULTURE & SOC'Y 801, 806 (2003) (defining investigative journalism as "extensive research by one or more journalists to uncover matters which affect the citizenry of the society in which the journalist lives and of which the society generally does not approve but is unaware").

185. CARL BERNSTEIN & BOB WOODWARD, ALL THE PRESIDENT'S MEN (1974).

186. ANDREW ROSS SORKIN, TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM—AND THEMSELVES (2009).

187. Of course, they do so in ways that an individual's untrained senses could not. This is why, to take the example with which Post begins the book, we rely on experts to show us that cigarettes cause cancer, but not to prove the existence of oak trees in our yards. POST, *supra* note 1, at ix. But journalists, too, uncover facts that an individual's untrained senses could not.

188. Patrick Garry collects and discusses these rules. *See* Patrick J. Garry, *Assessing the Constitutional Autonomy of Such Non-State Institutions as the Press and Academia*, 2010 UTAH L. REV. 141, 152–53 (2010). My explanation here is drawn from his.

189. *Id.* at 152 ("In 1922, the American Society of Newspaper Editors introduced the first ethical guidelines, called the 'Canons of Journalism.'").

190. *Id.* (citing American Newspaper Guild, Code of Ethics, Canon 5 (1934), *reprinted in* THE NEWSPAPER AND SOCIETY 567 (George L. Bird & Frederic E. Merwin eds., 1942)).

discipline are regularly disciplined through social or employment-related sanctions.[191]

Journalistic disciplinarity may well extend, albeit in different forms, beyond the institutional press. As noted above, the boundaries of the press have changed significantly, to the point that perhaps we are all truly journalists now.[192] But even the non-institutional press—citizen journalists and the blogosphere, for example—has its own norms, many of which are rigorously enforced. These norms include linking to other sources, having open comments sections, admitting errors, and not "hijacking" comments threads.[193] Writers who fail to adhere to them are sanctioned through mockery, shunning, and loss of readership and status, which for many bloggers and citizen-journalists are the primary reasons to write at all. These may not seem like concrete harms comparable to a denial of tenure, but in a world where reputation and social capital are driving forces, the incentive to adhere to social standards is significant.

Inasmuch as these disciplinary norms limit journalists' autonomous speech in the name of some other value, the press has much in common with academia. A professor who fails to adhere to the standards of research and publication in her field will be denied tenure notwithstanding whatever autonomy interest she has in her research. Similarly, journalists are not free to pursue their own individual interests free from any institutional constraints. Their speech, in other words, is not protected on the basis of their autonomy, but because it is produced in accordance with the norms of their discipline. Post argues that scholarship is worthy of First Amendment protection precisely when and because it respects disciplinary norms.[194] Journalism, on this account, may be entitled to solicitude on the same basis.

Extending constitutional protection to the press based on the principle of democratic legitimation would entail some major shifts in First Amendment jurisprudence. As Post notes, "the value of democratic competence can be judicially protected only if courts incorporate and

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191. *See, e.g.*, *Times Reporter Who Resigned Leaves Long Trail of Deception*, N.Y. TIMES, May 11, 2003, at N1 (detailing wrongdoings of disgraced *Times* reporter Jayson Blair, who fabricated stories); SHATTERED GLASS (Lions Gate Films 2003) (relating the story of journalist Stephen Glass, who was fired for fabricating stories).

192. *See* GANT, *supra* note 126.

193. *See, e.g.*, Jacqueline D. Lipton, *What Blogging Might Teach About Cybernorms*, 4 AKRON INTELL. PROP. J. 239 (2010) (discussing the development and identification of norms in the blogosphere).

194. POST, *supra* note 1, at 90 (arguing that only universities that are "dedicated to the disciplinary diffusion of knowledge and to the disciplinary discovery of new knowledge" are entitled to protection under the principle of democratic competence).

apply the disciplinary methods by which expert knowledge is defined."[195] Courts would therefore need to incorporate and apply the press's disciplinary methods. That could mean giving constitutional protection to such press methods as anonymous sourcing (a reporters' privilege) and newsgathering (a right of access). But it would also mean that the state could police journalists in much the same way as it polices commercial or professional speech—to ensure that they are fulfilling the functions that entitle them to protection in the first place. That would in itself be a very high price to pay.[196] Whether the argument from democratic legitimation is a normatively attractive one for the press therefore requires far more attention than this Essay has been able to give it.

CONCLUSION

The goal of this Essay has been to explore two ways in which the tools Post employs seem to work awkwardly together. Part I attempts to illustrate a few possible complications with the relationships between public discourse, social practices, and the value of democratic legitimation. If the first two concepts are disconnected from the third, the justification for protecting public discourse and social practices seems circular or unprincipled. But if they are fully dependent on the value of democratic legitimation, they become no more than conclusory labels for protected speech. Using public discourse as a continually evolving proxy for speech that is "normatively necessary for influencing public opinion"[197] addresses both of these problems to some degree, though admittedly raises a new set of complications.

Part II suggests that the relationship between public discourse and expert knowledge—and therefore between democratic legitimation and democratic competence—is even more problematic than Post has recognized.[198] He has not yet explored the mechanisms by which that dissemination happens, whether dissemination requires its own forms of disciplinarity, and how expert knowledge can retain its status as such after it enters public discourse. It is to all of our advantage, however, that the expert knowledge in his book has entered that discourse.

It would be impossible for any book, even one by Robert Post, to fully explain both the characteristics of participatory democracy and the

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195. *Id.* at 54.

196. I am very grateful to Robert Post for pointing this out to me.

197. POST, *supra* note 1, at 18.

198. *Id.* at xiii.

methods by which expert knowledge is produced and disseminated. *Democracy, Expertise, and Academic Freedom* comes about as close as any one book possibly could to achieving these crucially important goals. In doing so, it has also illuminated the deep tension between them. Mediating that tension, however, remains one of the central and intractable challenges for First Amendment theory and doctrine.